No. 18-16896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, P.C.,
Plaintiffs-Appellees,

v.

THE STATE OF ARIZONA and MARK BRNOVICH,
ARIZONA ATTORNEY GENERAL,
Defendants-Appellants,

and JIM DRISCOLL, COCONINO COUNTY SHERIFF, *et al.*,
Defendants.

On appeal from the United States District Court for the District of Arizona
Case No. 3:17-cv-08263

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES MIKKEL JORDAHL AND MIKKEL (MIK) JORDAHL, P.C.

Brian Hauss
Vera Eidelman
Ben Wizner
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2500

Kathleen E. Brody
ACLU Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
T: (602) 650-1854

Attorneys for Plaintiffs-Appellees

Dated: January 17, 2019

CORPORATE DISCLOSURE STATEMENT

Mikkel (Mik) Jordahl, P.C., has no parent corporations. It has no stock, so therefore no publicly held company owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court entered an order granting Plaintiffs' motion for preliminary injunction on September 27, 2018. ER 1. Defendants Arizona Attorney General Mark Brnovich and the State of Arizona (collectively, the "State") filed a timely notice of appeal on October 1, 2018. ER 67. The district court asserted jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF ISSUES

1. Whether the district court abused its discretion in holding that Plaintiffs are likely to succeed in demonstrating that the Act violates the First Amendment facially and as-applied, where the Act requires state and local government contractors to certify that they are not participating in boycotts of Israel or territories controlled by Israel.
2. Whether the district court abused its discretion in holding that Plaintiffs have demonstrated that the violation of their First Amendment rights imposes irreparable harm.
3. Whether the district court abused its discretion by enjoining the State from enforcing the Act's certification requirement.

STATEMENT OF THE CASE

The Act

In 2016, the State of Arizona enacted House Bill 2617 (the "Act"). The Act states in relevant part: "A public entity may not enter into a contract with a company to acquire or dispose of services, supplies, information technology or construction unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel." A.R.S. § 35-393.01(A). The Act defines "Boycott" as:

> [E]ngaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with Israel or with persons or entities doing business in Israel or in territories controlled by Israel, if those actions are taken either:
>
> (a) In compliance with or adherence to calls for a boycott of Israel other than those boycotts to which 50 United States Code section 4607 (c) applies; [or]
>
> (b) In a manner that discriminates on the basis of nationality, national origin or religion and that is not based on a valid business reason.

Id. § 35-393(1).[1] It defines "Company" as "a sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability company or other entity or business association, and includes a wholly

[1] 50 U.S.C. § 4607 is part of the Export Administration Act ("EAA"), which prohibits U.S. persons from complying with a foreign country's request to boycott a country friendly to the United States. HB 2617 apparently references the EAA in order to avoid the EAA's preemption provision. *Id.* § 4607(c).

owned subsidiary, majority-owned subsidiary, parent company or affiliate." *Id.* § 35-393(2).

The Act's legislative findings state *inter alia* that it "seeks to implement Congress's announced policy of 'examining a company's promotion or compliance with unsanctioned boycotts of, divestment from, and sanctions [BDS] against Israel as part of its consideration in awarding grants and contracts . . . .'" ADD-12. As the State itself notes, federal policy defines BDS boycotts as "politically motivated actions." Opening Br. at 43 (quoting 19 U.S.C. § 4452(b)(4)). In its press release announcing the Act's introduction, the Arizona House of Representatives Republican Caucus explained that the Act will target "companies engaging in actions that are politically motivated." ER 33 (quoting Ariz. House Republican Caucus News Release, H.R. Rep. (Feb. 4, 2016)).[2]

The legislative findings also state that "Companies that refuse to deal with United States trade partners such as Israel, or entities that do business with or in such countries, make discriminatory decisions on the basis of national origin that impair those companies' commercial soundness." ADD-12. The findings further state that "a company's decision to discriminate against Israel, Israeli entities or entities that do business with Israel or in Israel is an unsound business practice making the company an unduly risky contracting partner or vehicle for

[2] *Available at*: https://www.azleg.gov/Press/house/52leg/2r/GOWAN_ISRAEL_RELEASE.PDF.

investment." *Id*. The Act's Senate Fact Sheet states that "[t]here is no anticipated fiscal impact to the state General Fund associated with this legislation." SER 38.

Mr. Jordahl's Boycott Participation

Mr. Jordahl comes from three generations of Lutheran ministers, including his father. ER 285 ¶ 5. He first became interested in the Israeli-Palestinian conflict in 1977, when he spent three months with his parents while they were living in the West Bank. *Id.* ¶ 6. Both Mr. Jordahl and his parents were profoundly affected by what they saw in the occupied Palestinian territories. *Id*. Upon his return to the United States, Mr. Jordahl established the Oberlin College chapter of the Palestine Human Rights Campaign. *Id.*

Mr. Jordahl raised his son Jewish. *Id.* ¶ 7. They took a trip together to Israel and Palestine in the spring of 2017. *Id.* They were disheartened to hear many people express the opinion that Israeli settlements in the occupied Palestinian territories would prevent an end to the occupation. *Id.* Many of the Palestinians they met expressed no hope that they would ever receive equal rights in the occupied territories. ER 285–86 ¶ 7.

Mr. Jordahl has been moved by the Evangelical Lutheran Church in America's (ELCA) "Peace Not Walls" campaign, which seeks to promote the "equal human dignity and rights for all people in the Holy Land," as well as "an end to Israeli settlement building and the occupation of Palestinian land." ER 286 ¶

9. The campaign calls on "individuals to invest in Palestinian products to build their economy and to utilize selective purchasing to avoid buying products" made in Israeli settlements in the occupied Palestinian territories. *Id.*

Mr. Jordahl is also a non-Jewish member of Jewish Voice for Peace ("JVP"). *Id.* ¶ 10. JVP describes itself as a national grassroots organization inspired by Jewish tradition to work "for a just and lasting peace according to principles of human rights, equality, and international law for all the people of Israel and Palestine." *Id.* JVP endorses the call from Palestinian civil society for BDS campaigns to protest the Israeli government's occupation of Palestinian territories. *Id.* Among other activities, JVP organizes consumer boycott campaigns against companies that support the occupation. ER 176.

In adherence to these calls for boycott, Mr. Jordahl personally boycotts consumer goods and services offered by businesses supporting Israel's occupation of the Palestinian territories. *Id.* ¶ 11. This boycott extends to "all businesses operating in Israeli settlements in the occupied Palestinian territories." ER 185. Mr. Jordahl participates in this boycott to protest both the occupation and the settlements. ER 286 ¶ 11. Mr. Jordahl wishes to extend his boycott participation to his Firm. *Id.*

The Coconino County Jail District Contract

For the past twelve years, Mr. Jordahl's Firm has maintained a contract with the Coconino County Jail District. ER 286 ¶ 12. Under the contract, the Firm provides legal advice to incarcerated individuals regarding issues like conditions of confinement, civil rights, extradition, and habeas corpus. *Id.* The current contract between the Firm and County is for a multi-year period, with annual renewals. ER 287 ¶ 15. Under the contract, the Firm receives a monthly payment of $1,533, or more than $18,000 per year. *Id.*

The current contract began in the fall of 2016. *Id*. When the Firm and the County were entering into that agreement, an official from the County asked Mr. Jordahl to sign a new form entitled "Certification Pursuant to A.R.S. § 35-393.01." *Id*. ¶ 16. The certification stated, "Pursuant to the requirements of A.R.S. § 35-393.01(A), the Independent Contractor hereby certifies that the Independent Contractor is not currently engaged in a boycott of Israel," that "no wholly owned subsidiaries, majority-owned subsidiaries, parent companies, or affiliates of the Independent Contractor (if any) are currently engaged in a boycott of Israel," and that neither the Independent Contractor nor the above-mentioned associated entities would "engage in a boycott of Israel" for the duration of the contract. ER 292.

Mr. Jordahl was opposed to the requirement that he sign the certification. ER 287 ¶ 18. Fearing loss of the contract, however, he signed the certification under protest on October 14, 2016. ER 287–88 ¶¶ 18, 19. He sent the original signed certification to an official with the County. ER 288 ¶ 19. He also sent a copy to Rose Winkeler, Deputy County Attorney of Coconino County, along with a letter entitled "Re: Israel Boycott Addendum to Inmate Civil Rights Advising Contract." *Id.*; *see* ER 294. Mr. Jordahl wrote that although he would comply with the certification while the law was in effect, he believed that it violated his constitutional rights. ER 288 ¶ 20. He further wrote to clarify his understanding that the certification applied to him in his capacity "as a sole-proprietor contractor on behalf of [his] professional corporation and not in [his] personal capacity unrelated to any government contract." *Id.* ¶ 21. This apparently satisfied the County, and the contract commenced on November 10, 2016. *Id.* ¶ 22.

On November 14, 2017, Mr. Jordahl received a letter from the County regarding renewal of the 2016 contract. ER 289 ¶ 28. The letter asked Mr. Jordahl to sign and notarize the enclosed "agreement[] approved by [the County's] Board of Directors." *Id.*; *see* ER 306. The enclosed agreement stipulated to a one-year renewal of the 2016 contract between the Firm and the County; it did not change the contract's scope or compensation. ER 289 ¶ 29. It also included another Certification Pursuant to A.R.S. § 35-393.01, which was substantially unchanged

from the certification Mr. Jordahl signed under protest in 2016. *Id.* ¶ 30; *see* ER 309–10. Although Mr. Jordahl remains committed to providing his services to the County, he has not signed and returned the 2017 agreement, because he objects to making the certification. ER 289–90 ¶ 31. Until the District Court granted Plaintiffs' for preliminary injunction, the Firm was performing its services for the County without pay, and Plaintiffs expected to be paid only if a court ruled in their favor or they signed the certification. ER 192–93.

The Certification's Effects on Plaintiffs' Boycott Participation

Because of the certification, Mr. Jordahl has been careful to separate his personal boycott participation from the operation of his Firm, and not to use his Firm to support or affiliate with entities participating in boycotts of Israel or territories controlled by Israel. ER 288–89 ¶¶ 23–26. Were it not for the Act's certification requirement, he would extend his personal boycott participation to his Firm's consumer choices. ER 288 ¶ 24. For example, his firm would boycott Hewlett-Packard, based on Hewlett Packard's provision of information technology services used by Israeli checkpoints throughout the West Bank. *Id.*

Mr. Jordahl would also like his Firm to associate with JVP, which participates in BDS campaigns to put political pressure on Israel and which has asked the Firm to contribute office support and financial assistance to its boycott activities. *Id.* ¶ 25. Mr. Jordahl would like his Firm to provide financial

contributions, office support, and legal services to JVP, but he prematurely rejected these requests in order to comply with the certification. *Id.*; ER 199–200, 213.

Mr. Jordahl does not understand the certification to apply to his personal activities, but he reasonably fears that vocal advocacy about his personal boycott participation would lead to suspicion about whether his Firm is complying with the certification. ER 289 ¶ 27. As a result, he has been reluctant to promote or discuss his personal boycott participation. *Id.*

Procedural History

Plaintiffs brought this lawsuit on December 6, 2017, against the Arizona Attorney General, the Coconino County Sheriff, and members of the Coconino County Jail District Board of Supervisors in their official capacities.[3] The district court subsequently granted the State of Arizona's unopposed motion to intervene as a Defendant. ER 322. Plaintiffs filed a motion for preliminary injunction, arguing that the Act violates the First Amendment both on its face and as applied to them. ER 280. The State opposed Plaintiffs' motion, and also filed a motion to dismiss. ER 250.

On September 27, 2018, the court granted Plaintiffs' motion for preliminary injunction and denied the State's motion to dismiss. ER 1.

[3] Plaintiffs filed an amended complaint on January 17, 2018.

First, the court held that Mr. Jordahl's Firm was injured by the Act in at least two ways: "one, when it was required to promise [to] refrain [from] engaging in arguably constitutionally protected activity; and two, when the County stopped paying it for services rendered." ER 8. The court found that Mr. Jordahl "sufficiently established that his personal conduct, at least some of which would be prohibited by the Act, has been impermissibly chilled for fear that it may be confused with the Firm's conduct." ER 10. The court also determined that the Act's certification requirement "undermines the expressive nature of collective political boycotts by chilling Plaintiffs' ability to join in larger calls for political change." ER 10.

Second, the court held that Plaintiffs are likely to succeed in demonstrating that the Act's certification requirement imposes an unconstitutional condition on government contracts. ER 20. Citing the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, the court concluded that the Act's restriction on boycott participation burdens expressive political activity protected under the First Amendment. ER 20–26. The court accordingly applied the First Amendment test for restrictions on expression by government contractors, and found that the Act broadly restricts contractors' expressive conduct as citizens speaking on matters of public concern. ER 30–32. The court also determined that the State failed to justify the Act's blanket prohibition on expressive conduct. ER 32–34. The court found no

evidence to support the State's contention that the Act is necessary to advance its interests in "regulating the State's 'commercial activity to align commerce in the State with the State's policy objectives and values'" and "preventing discrimination on the basis of national origin." ER 32–33.

Finally, the court held that the harm to Plaintiffs' and other contractors' First Amendment interests is "irreparable per se," and that the balance of equities and the public interest also supported the issuance of a preliminary injunction. ER 35–36. Concluding that the Act "violates the First Amendment on its face," the court entered a preliminary injunction prohibiting Defendants from enforcing the Certification Requirement in A.R.S. § 35–393.01(A). ER 36.

The State appealed the district court's order on October 1, 2018. It moved for an emergency stay in the district court, which was denied. ER 37–41. The State also moved for an emergency stay in this Court, which was also denied. Dkt. 26.

SUMMARY OF ARGUMENT

Plaintiffs' claim is straightforward: The First Amendment protects the right to participate in political boycotts, including boycotts of Israel. The State cannot require people to disavow participation in such protected expression as a condition of receiving government contracts. Thus, the district court correctly held that Plaintiffs are likely to succeed on the merits of their facial First Amendment claim against the Act's certification requirement, and issued a preliminary injunction

enjoining enforcement of that provision. This did not constitute an abuse of discretion.

I. The district court did not abuse its discretion in holding that the Act burdens expressive activity protected under the First Amendment. In *NAACP v. Claiborne Hardware Co.*, which concerned a boycott of white-owned businesses in Mississippi to protest ongoing racial segregation and inequality, the Supreme Court held that political boycotts are a form of "expression on public issues," lying at the heart of the First Amendment. The Act restricts inherently expressive conduct by requiring contractors to expressly disavow participation in such boycotts. Moreover, the Act is content- and viewpoint-based, because it restricts boycotts based on their subject matter (Israel) and viewpoint (protest of Israel). Although the State attempts to distinguish *Claiborne* on a number of grounds, none of its arguments withstands scrutiny.

II. The district court did not abuse its discretion in holding that the Act facially violates the First Amendment by imposing an unconstitutional condition on government contracts. It is well-established that the government cannot compel public employees to disavow participation in speech or associational activities protected under the First Amendment, and the same rules apply to government contractors. In this case, the Act broadly restricts contractors from engaging as citizens in expressive conduct on matters of public concern. To justify this blanket

restriction on protected expression, the State must show that the expression has a necessary impact on the actual operation of the government. Here, the State has not submitted any evidence to support its contention that the Act is necessary to its asserted interests.

First, although the State characterizes the Act as an anti-discrimination measure, the Act is not remotely tailored to the State's interest in combating discrimination: the Act restricts participation in boycotts that could not plausibly be characterized as discriminatory, such as Plaintiffs' boycott of U.S. and foreign companies supporting Israel's occupation of the Palestinian territories; only one of the Act's two provisions applies to boycott actions taken "in a manner that discriminates on the basis of nationality, national origin, or religion." A.R.S. § 35-393(1)(b); and the Act does not prohibit "discrimination" unless it involves a boycott of Israel.

Second, the State's interest in denying "subsidies" to contractors who participate in disfavored boycotts cannot justify a condition that applies outside of work. Thus, although the State can control contractors' activities within the scope of their government work, it cannot limit contractors' expressive activities on their own time and dime. In this case, the Act requires government contractors to disavow participation in boycotts of Israel across the board, no matter the scope of

the contract. The Act thus imposes a blanket restriction on expression well outside the scope of most government contracts.

III. The district court did not abuse its discretion in holding that the Act's infringement of First Amendment rights imposes irreparable harm on Plaintiffs and other government contractors. By forcing them to choose between disavowing participation in protected boycotts and losing their contracts, the Act imposes a concrete, immediate, and irreparable harm justifying injunctive relief.

IV. The district court did not abuse its discretion by enjoining the State from enforcing the Act's certification requirement. Injunctive relief is appropriately tailored to the scope of the violation. Because the district court concluded that the Act is facially invalid, facial relief—protecting the First Amendment rights of all contractors subject to the Act's requirements—was appropriate. Although the State argues that the district court should have severed the Act, none of the proposed severances would cure the Act's constitutional defects without rewriting the legislation.

STANDARD OF REVIEW

This Court "review[s] the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam) (citation omitted). Such review is "limited and deferential." *Id.* "An abuse of

discretion will be found if the district court based its decision on an erroneous legal standard or clearly erroneous finding of fact." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation and internal quotation marks omitted). This Court "may affirm the district court on any ground supported by the record." *Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011). On the other hand, appellants may not upset the district court's grant of preliminary injunction by raising an issue for the first time on appeal. *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 974 (9th Cir. 2015).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Holding That Plaintiffs Are Likely to Succeed on Their First Amendment Claims.

The district court held that the Act facially violates the First Amendment by imposing a blanket restriction on contractors' expressive conduct. The court correctly concluded that the Act: (1) penalizes political boycotts protected by the First Amendment; and (2) unconstitutionally conditions government contracts on a written promise not to engage in expressive conduct on matters of public concern. Contrary to the State's arguments, the court correctly applied the facial analysis used to evaluate blanket restrictions on expression by government employees and contractors, and the court's decision does not conflict with federal sanctions law or the Export Administration Act ("EAA").

A. The Act Penalizes Political Boycotts Protected by the First Amendment.

The Act broadly restricts expressive conduct by requiring contractors to disavow participation in boycotts protected under the First Amendment. The Act prohibits contractors from refusing to deal with companies as part of a boycott campaign, and it also prohibits "other actions" intended to limit commercial relations with Israel. A.R.S. § 35-393(1). Although the State argues that the Act does not restrict speech or association, the Act's legislative findings indicate that it applies to a contractor's "promotion or compliance with unsanctioned boycotts." ADD-12. Moreover, the Act burdens disfavored boycotts on the basis of their subject matter (Israel) and viewpoint (protest of Israel). Directly contradicting *Claiborne*, the State argues that political boycotts are not protected by the First Amendment. But the cases cited by the State will not bear the weight placed on them.

1. The First Amendment Protects Political Boycotts, Including Boycotts of Israel.

The district court concluded that the Act restricts expressive conduct by prohibiting contractors from participating in political boycotts. ER 20–26. The Act requires contractors to certify that they will not boycott Israel or territories controlled by Israel for the duration of their contracts. A.R.S. § 35-393. And it defines "boycott" as a termination of business activities, refusal to deal, or "other

actions that are intended to limit commercial relations . . . in compliance with or adherence to calls for a boycott of Israel." A.R.S. § 35-393(1)(a). The Act's legislative findings further indicate that its fundamental purpose is to suppress participation in politically motivated boycotts of Israel. ADD-12.

Since the Supreme Court's landmark decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), it has been clear that the First Amendment protects the right to engage in political boycotts. *Claiborne* concerned a boycott of white-owned businesses in Port Gibson, Mississippi to protest ongoing racial segregation and inequality. *Id.* Merchants targeted by the boycott sued the boycott participants, seeking to recover business losses caused by the boycott and enjoin future boycott activity. *Id.* The Mississippi Supreme Court upheld the trial court's imposition of liability, concluding that "the entire boycott was unlawful" because the trial court had found that it was enforced through threats and violence. *See id.* at 895. The court summarily rejected the boycotters' First Amendment defense. *Id.*

The U.S. Supreme Court reversed, holding that "the nonviolent elements of [the boycotters'] activities are entitled to the protection of the First Amendment." *Id.* at 915. Although the Court acknowledged that "States have broad power to regulate economic activity," it did "not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id.* at 913. Observing that "the practice of persons sharing common views banding together to

achieve a common end is deeply embedded in the American political process," the Court held that peaceful political boycotts constitute a form of "expression on public issues," which "has always rested on the highest rung of the hierarchy of First Amendment values." *Id.* at 907, 913 (citations and internal quotation marks omitted); *see also id.* at 915 (characterizing the boycott as "essential political speech lying at the core of the First Amendment") (quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)). The Court thus concluded that the non-violent elements of the *Claiborne* boycott were entitled to First Amendment protection. *Id.* at 915.

Claiborne also established the principles for distinguishing protected political boycotts from unprotected economic boycotts. Given the government's interest "in certain forms of economic regulation," the Court held that the state could curtail "[t]he right of business entities to 'associate' to suppress competition," and that other "[u]nfair trade practices may be restricted," along with "secondary boycotts and picketing by labor unions." *Id.* at 912 (citations omitted); *see also id.* at 915 n.49 (noting that the state may restrict boycotts "designed to secure aims that are themselves prohibited by a valid state law"). Since *Claiborne*, the Supreme Court has repeatedly reaffirmed that the First Amendment protects the right to engage in political boycotts and related advocacy, even though it does not protect boycotts motivated by economic self-interest or designed to secure an

illegal objective. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 (1998); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988); *see also Jews for Jesus, Inc. v. Jewish Cmty. Rels. Council of N.Y, Inc.*, 968 F.2d 286, 297–98 (2d Cir. 1992) (holding that communications threatening to boycott a resort unless it denied accommodation to a religious group were not protected under the First Amendment, because the communications privately sought to compel the resort to violate valid state and federal anti-discrimination statutes).

"The conduct prohibited by the [Arizona] law is protected for the same reason as the boycotters' conduct in *Claiborne* was protected." *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018). Plaintiffs and others who participate in boycotts of Israel or territories controlled by Israel "have banded together to express collectively their dissatisfaction with Israel and to influence governmental action. Namely, [the boycott] organizers have banded together to express collectively their dissatisfaction with the injustice and violence they perceive, as experienced both by Palestinians and Israeli citizens." *Id.* Thus, "[Plaintiffs] and others participating in this boycott of Israel seek to amplify their voices to influence change, as did the boycotters in *Claiborne*." *Id.* Like the *Claiborne* boycott, the boycotts of Israel targeted by the Act seek to make "government and business leaders comply with a list of demands for equality and racial justice."

Allied Tube, 486 U.S. at 508. Plaintiffs and other boycott participants do not "stand to profit financially from a lessening of competition in the boycotted market," *id.*, nor do they seek to achieve ends prohibited by any valid state or federal law. To the contrary, the boycotts targeted by the Act are "peaceful acts of protest and based on political beliefs." ER 212.

The State's attempts to dispel *Claiborne* are unavailing.

First, the State contends that refusals to deal are not inherently expressive, and that "*Claiborne*'s central holding invalidated Mississippi's attempt to impose liability on the NAACP purely for *speech*." Opening Br. at 36 (emphasis in original). This is simply not true. *Claiborne* held that "a nonviolent, politically motivated boycott" is "constitutionally protected." 458 U.S. at 918 ("Petitioners *withheld their patronage* from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of *nonviolent, protected activity*." (Emphases added)). The rest of the Court's decision flowed from its initial recognition that the boycott itself was constitutionally protected. *See id.* at 915. ("The Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent, politically motivated

boycott. The fact that *such activity is constitutionally protected*, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed." (Emphasis added)).

In any event, the Act applies to more than just a refusal to deal. It requires contractors to certify that they are not participating in boycotts. The Act's legislative findings make clear that it applies to a company's "*promotion* or compliance with unsanctioned boycotts." ADD-12 (emphasis added). And it defines "boycott" to mean "engaging in a refusal to deal, terminating business activities or performing *other actions* that are intended to limit commercial relations with Israel . . . ." A.R.S. § 35-393(1) (emphasis added). As the district court recognized, "the potential reach of what activities constitute 'other actions'" is wide, ER 23, because boycott actions take "many forms," *Claiborne*, 458 U.S. at 907. In *Claiborne*, the Mississippi courts imposed liability for actions such as "management of the boycott," speech made in support of the boycott, and association with boycott organizers, *id.* at 897. Plaintiffs' boycott similarly involves a wide range of actions that could be construed as elements of the overall boycott—including membership in boycott organizations, signing boycott petitions, participating in boycott demonstrations, and donating money or services to facilitate boycott activities. These actions could plausibly be deemed proscribed boycott activities under the Act.

The Act therefore directly restricts, and indirectly chills, a wide range of boycott-related expression and association. Contractors who sign the certification will steer far clear of any expression or association that could be viewed as promoting or complying with an illegal boycott. *See Moonin v. Tice*, 868 F.3d 853, 861 n.5 (9th Cir. 2017) (the "focus in the prospective restraint context is on the chilling effect of the employer's policy on employee speech," which is "determined by the language of the policy—what an employee reading the policy would think the policy requires—not what [the employer] subjectively intended the [policy] to say"); *see also Baggett v. Bullitt*, 377 U.S. 360, 367–68 (1964); *NAACP v. Button*, 371 U.S. 415, 434–35 (1963). Plaintiffs, for instance, turned down opportunities to support and associate with JVP because of the organization's central commitment to BDS. ER 199–200, 213, 288–89 ¶¶ 25, 26. Other contractors may fear to engage in peaceful picketing—e.g., protesting outside a Best Buy with signs stating "Boycott Hewlett Packard, It Supports Israel's Occupation Of the West Bank"—because that could be considered "promotion" of a proscribed boycott, as well as an "action[] that [is] intended to limit commercial relations with . . . persons or entities doing business in Israel or in territories controlled by Israel." A.R.S. § 35-393(1).[4]

[4] Although the State maintains that the Act's use of the term "boycott" does not encompass boycott-related advocacy or association, this position does not have the force of law. *See, e.g.*, *Ruiz v. Hall*, 191 Ariz. 441, 449 (1998) (stating that even

Second, the State argues that *Claiborne* applies only to boycotts by individuals. But the Supreme Court has expressly "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons." *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (citation and internal quotation marks omitted). The named defendant in *Claiborne* was the NAACP, "a New York membership corporation," which organized the boycott. *Claiborne*, 458 U.S. at 889. Another defendant in the trial court was Mississippi Action for Progress, Inc., an incorporated community action organization that "authorized [its] Claiborne County representatives to purchase food only from black-owned stores." *Id.* at 901. The Court nowhere suggested that these organizations could be held liable for their politically-motivated boycott activity. The Court's subsequent decisions further demonstrate the point. In *Allied Tube*, 486 U.S. at 509, and *Superior Court Trial Lawyers*, 493 U.S. at 426–28, the Court distinguished

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formal "Opinions of the Attorney General are advisory, and are not binding"). The State's assurances are thus cold comfort to contractors forced to sign a government form promising that they are not currently engaged in a boycott of Israel. *See Stenberg v. Carhart*, 530 U.S. 914, 940 (2000) ("[O]ur precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement authorities.'"); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383–84 (2d Cir. 2000).

Claiborne because the boycotts in those cases were motivated by economic self-interest, not because the boycott participants were business entities.

Finally, the State asserts that *Claiborne* applies only to boycotts protesting the violation of constitutional rights by domestic governmental entities. If the State were right, then boycotts protesting segregated restaurants, South Africa, Wal-Mart, Nike, the NRA, or Planned Parenthood could all be outlawed. But that has never been the test for determining whether boycotts—or any other forms of political expression or expressive conduct—are constitutionally protected. The *Claiborne* boycott itself was not simply a demand for the local government to respect constitutional rights. It was directed at "both civic and business leaders," 458 U.S. at 907, and "sought to bring about political, social, and economic change," *id.* at 911. It was therefore protected as a form of "expression on public issues," just like the boycotts at issue here. ER 31–32; *see also Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union*, 39 F.3d 191, 197 (8th Cir. 1994) (holding that a union-organized consumer boycott to protest a grocery store's discriminatory labor practices was "constitutionally safeguarded" under *Claiborne*). The State's argument to the contrary—that the First Amendment protects only those boycotts advocating legal reform—ignores our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," as well as the Supreme Court's instruction

that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 271 (1964).

2. The Act Regulates Political Boycotts Based on Their Subject Matter and Viewpoint.

The Act suffers from an additional vice: It applies only to boycotts of Israel. "This is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel. Both are impermissible goals under the First Amendment." *Koontz*, 283 F. Supp. 3d at 1022.

First, the Act is facially content discriminatory. It "describes impermissible [boycotting] not in terms of time, place, and manner, but in terms of subject matter." *Chi. Police Dep't v. Mosley* 408 U.S. 92, 99 (1972). "[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of the government." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). For this reason, content-based restrictions on expression are presumptively invalid. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816–17 (1981).

The State argues that the Act should be evaluated as a content-neutral regulation of conduct, deserving at most intermediate scrutiny under *United States*

v. O'Brien, 391 U.S. 367 (1968). Opening Br. at 48. *O'Brien* scrutiny is limited "to those cases in which 'the governmental interest is unrelated to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (citing *O'Brien*, 391 U.S. at 377). By contrast, government actions "directed at the communicative nature of conduct" are content based, and "must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *United States v. Swisher*, 811 F.3d 299, 312–13 (9th Cir. 2016) (en banc) (internal quotation marks omitted) (quoting *Johnson*, 491 U.S. at 406).

The Act is transparently directed at the communicative nature of expressive conduct. It does not just regulate contractors' commercial transactions, it requires them to certify that they are not participating in disfavored boycotts of Israel. The Act's legislative findings state that it "seeks to implement Congress's announced policy of 'examining a company's promotion or compliance with unsanctioned [BDS campaigns] against Israel as part of its consideration in awarding grants and contracts . . . .'" ADD-12; *see also* 19 U.S.C. § 4452(b)(4) (stating that BDS boycotts "are politically motivated"). It is hard to imagine a more blatant violation of *Claiborne*'s core holding that the government may not prohibit participation in peaceful political boycotts. *See* 458 U.S. at 913.

Like the flag burning statute the Supreme Court struck down in *United States v. Eichman*, 496 U.S. 310 (1990), and the unauthorized medal statute this

Court struck down in *Swisher*, the Act's concerns about contractors' purchasing decisions "blossom only when [the decision] communicates some message" as part of a boycott of Israel, "and thus are related to the suppression of free expression." *Swisher*, 811 F.3d at 313 (quoting *Johnson*, 491 U.S. at 410) (internal quotation marks omitted). Because the Act is content discriminatory, it "must be subjected to 'the most exacting scrutiny.'" *Eichman*, 496 U.S. at 318 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

Second, the Act is viewpoint discriminatory. Viewpoint discrimination "occurs when the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction." *Eagle Point Educ. Ass'n v. Jackson Cty. Sch. Dist. No. 9*, 880 F.3d 1097, 1106 (9th Cir. 2018) (emphasis in original) (citation and internal quotation marks omitted)). Even a "facially reasonable" justification "cannot save a regulation 'that is in fact based on the desire to suppress a particular point of view.'" *Id.* (citation and internal quotation marks omitted).

The State itself candidly admits that the Act restricts contractors' boycott participation in order "to align [commercial activity] with the State's public policy objectives and values." Opening Br. at 48. In particular, the State seeks to demonstrate its support for Israel and its opposition to those who oppose Israel.

Thus, the State speculates, without any explanation or evidentiary support in the record, that "the effect—and often goal—of BDS boycotts is to strengthen the hand of the Palestinian Liberation Organization, which pays cash stipends to the families of terrorists, and its governmental coalition partner—and terrorist organization—Hamas." *Id.* at 49. The State argues that it should not be left "powerless to prevent its commerce from furthering such unsavory—and frequently murderous—ends." *Id*. In other words, the State equates its contractors' participation in boycotts of Israel with support for terrorism. "It would be blinking reality not to acknowledge that there are some among us always ready to affix a [terrorist] label upon those whose ideas they violently oppose." *Baggett*, 377 U.S. at 373 (quoting *Cramp v. Bd. of Pub. Instruction*, 368 U.S .278, 286–87 (1961)). The use of such a label to describe nonviolent protest activity is a telltale sign that it is the ideas the State opposes, and nothing else.

The State has thus identified a particular group of speakers whose "unsanctioned" boycotts of Israel, ADD-12, convey messages that are inconsistent with the State's "values." *See Sorrel v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011) (holding that a law was viewpoint discriminatory where it targeted drug detailers who "convey messages that 'are often in conflict with the goals of the state'"). "The legislature designed [the Act's certification requirement] to target those speakers and their messages for disfavored treatment." *Id.* "Given the legislature's

expressed statement of purpose," as well as the State's defense of the Act, "it is apparent that [the Act] imposes burdens that are based on the content of [expressive conduct] and that are aimed at a particular viewpoint." *Id.*

3. The State's Other Cases Are Inapposite.

Unable to distinguish *Claiborne*, the State instead relies on a grab bag of inapplicable cases and doctrines, including: *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47 (2006); the "incidental-burden" cases; and *Briggs & Stratton Corp. v. Baldridge*, 728 F.2d 915 (7th Cir. 1984) ("*Briggs II*"). Opening Br. at 29–41. The district court considered these arguments, and rejected them.

a. *International Longshoremen*

Although the State argues that the Supreme Court's decision in *International Longshoremen* "is on all fours here," Opening Br. at 32, the decision has been expressly confined to the context of secondary boycotts by labor unions. ER 21. In that case, the Supreme Court held that a labor union's refusal to serve ships carrying Russian cargo constituted an illegal secondary boycott under the National Labor Relations Act. The Court rejected the labor union's First Amendment defense, stating that "the labor laws reflect a careful balancing of interests." 456 U.S. at 226.

The Court echoed this sentiment just a few months later, in *Claiborne*. There, it held that although the government cannot prohibit political boycotts generally, "[s]econdary boycotts and picketing *by labor unions* may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" 458 U.S. at 912 (emphasis added) (citing, *inter alia*, *Longshoremen*).[5]

b. *Rumsfeld*

The State also leans on the Supreme Court's decision in *Rumsfeld*. *Rumsfeld* rejected a First Amendment challenge to the Solomon Amendment, which allows the Department of Defense to deny federal funds to law schools that prohibit or impede military representatives from participating in on-campus recruiting. 547 U.S. at 55. The Supreme Court held that the Solomon Amendment's access requirement does not regulate inherently expressive conduct. *Id. at* 65–68.

Claiborne, on the other hand, made clear that political boycotts, especially boycotts of consumer goods and services, are a form of "expression on public issues," and "essential political speech lying at the core of the First Amendment."

[5] Indeed, if *Longshoremen* controlled outside the labor context, that would suggest there is no First Amendment right to picket either, since *Longshoremen* also recognized that the NLRA validly proscribes secondary picketing by labor unions. *See* 456 U.S. at 226. That result is plainly untenable. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011).

458 U.S. at 913, 915 (citation and internal quotation marks omitted). Such boycotts are ubiquitous today, and boycotting is a "practice . . . deeply embedded in the American political process." *Id.* at 907. Thus, "[i]t is easy enough to associate [Plaintiffs'] conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians. And boycotts—like parades—have an expressive quality." *Koontz*, 283 F. Supp. 3d at 1024.

The State parries that *Rumsfeld* "also involved . . . a boycott." Opening Br. at 24. The State apparently believes that *Rumsfeld* overruled *Claiborne sub silentio*, even though neither a citation to *Claiborne* nor the word "boycott" appears anywhere in the Supreme Court's decision. Indeed, the State goes so far as to contend that *Rumsfeld* gives it the authority to criminalize participation in civil society boycotts of Israel. Opening Br. at 49 ("As explained above, the Act would be constitutional even as a direct, criminal prohibition of conduct—much as the EAA is nationally."). This stretches *Rumsfeld* well past the breaking point.

First, whereas the Solomon Amendment principally regulated conduct, the Act directly regulates expression and association. The Solomon Amendment required law schools to take a particular action—giving military recruiters equal access to campus services during job fairs. So long as law schools provided access to recruiters, they remained free to boycott the military in other respects and could publicly declare their participation in such boycotts. The Act, on the other hand,

requires contractors to affirmatively certify that they are not participating in boycotts of Israel, full stop. In contrast to the Solomon Amendment, the Act affects all aspects of a contractor's participation in a boycott campaign. It seeks to accomplish exactly what *Claiborne* prohibits. ER 22–24.

Second, the Supreme Court held that the Solomon Amendment is a speech-neutral regulation that promotes the government's substantial "interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers." *Rumsfeld*, 547 U.S. at 67. By contrast, the Act is motivated by the impermissible desire to suppress boycott campaigns that do not align with the State's support for Israel.

Finally, although the plaintiffs in *Rumsfeld* characterized their actions as a boycott, the Supreme Court did not treat it as one. Whatever the scope of First Amendment protection for boycotts might be, *Claiborne* at least makes clear that boycotts of consumer goods and services—like the Port Gibson boycott and the boycott at issue here—are protected under the First Amendment. *Beverly Hills Foodland*, 39 F.3d at 197.[6]

[6] Although the State mischaracterizes Plaintiffs' boycott of consumer goods and services as a "commercial-supply boycott," Opening Br. at 29, Plaintiffs do not have any commercial supply contracts. They purchase goods and services from retail outlets and websites, like most other consumers. ER 181.

c. *Incidental-Burden Cases*

The State's reliance on the "incidental burden" doctrine is equally misplaced. Discrimination in employment and access to places of public accommodation is unexpressive conduct, subject to regulation by anti-discrimination law. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624–26 (1984)). Along the same lines, most commercial transactions are not expressive, and may be subject to economic regulation. *Sorrell*, 564 U.S. at 567. The Supreme Court has made clear that regulations targeting such unexpressive conduct may incidentally burden protected expression and association. *Id*.

In this case, however, the Act "imposes more than an incidental burden on protected expression." *Id*. It directly penalizes participation in disfavored political boycotts, which are nonetheless fully entitled to the protection of the First Amendment. *See Claiborne*, 458 U.S. at 915. The incidental burden doctrine does not apply when a law directly targets protected expression, and especially when it targets such expression based on its subject matter and viewpoint. *Sorrell*, 564 U.S. at 567.

d. *Briggs*

Finally, the State relies on the Seventh Circuit's decision in *Briggs & Stratton Corp. v. Baldridge*, which the State characterizes as the "authoritative and final word on the constitutionality of anti-Israel boycott prohibitions." Opening Br. at 35. In that case, two companies doing business with Arab League member states challenged provisions in the Export Administration Act ("EAA") that prohibit U.S. companies from participating in government-led boycotts of countries friendly to the United States. *See* 50 U.S.C. § 4607. The plaintiffs argued that the EAA violated their First Amendment rights by prohibiting them from filling out questionnaires propounded by the Arab League states to ensure that its trade partners were complying with government-led boycotts of Israel. *Briggs II*, 728 F.2d at 917. The companies "concede[d] that their desire to answer the questionnaires [verifying their boycott participation] [was] motivated by economics: . . . [they] hope[d] to avoid the disruption of trade relationships that depend on access to the Arab states." *Id*. The district court and the Seventh Circuit accordingly analyzed the companies' claims under the commercial speech doctrine, declining to afford them the constitutional protections for political expression. *Id*. 917–18.

Applying that standard, the Seventh Circuit agreed with the district court that the EAA was a constitutionally permissible restriction on speech to "forestall

attempts by foreign governments to embroil American citizens in their battles against others by *forcing* them to participate in actions which are repugnant to American values and traditions." *Briggs & Stratton Corp. v. Baldridge*, 539 F. Supp. 1307, 1319 (E.D. Wis. 1982) (internal quotation marks omitted) (emphasis added); *see also Briggs II*, 728 F.2d at 916 (adopting the district court's opinion). Put otherwise, the EAA was enacted to protect American businesses from having to choose sides in a foreign dispute, whereas the Act coerces American businesses into doing just that by imposing the State's preferred policy position. The State's use of its economic power to suppress participation in disfavored political boycotts is just as "repugnant to American values and traditions" as the Arab League's use of its economic power to compel boycott participation.

Even putting that aside, *Briggs* does not apply here, for at least two more reasons. First, "the substantial state interests advanced by the government in *Briggs*—foreign policy and international trade relations—are simply not present here." ER 25–26; *cf. Movsesian v. Victoria Verischerung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012) ("The Constitution gives the federal government the exclusive authority to administer foreign affairs.").

Second, whereas the *Briggs* plaintiffs merely sought to maintain trade relationships with the Arab League, Plaintiffs and others who participate in proscribed boycotts of Israel seek to express their political beliefs. The State

contends that "there is nothing talismanic about [a boycott] being 'politically-motivated.'" Opening Br. at 41. Not so. *Claiborne* expressly distinguished "boycott[s] organized for economic ends," which are unprotected, from political boycotts, which are protected. *Claiborne*, 458 U.S. at 915 (quoting *Henry*, 595 F.2d at 303); *see also Superior Court Trial Lawyers*, 493 U.S. at 428. Here, there is no dispute that the boycotts targeted by the Act, including Plaintiffs' boycott, are politically motivated. These boycotts are therefore fully entitled to First Amendment protection. *See Koontz*, 283 F. Supp. 3d at 1021.[7]

B. The Act Imposes an Unconstitutional Condition on Government Contractors.

By unconstitutionally conditioning government contracts on a written certification disavowing participation in boycotts of Israel or territories controlled by Israel, the Act also implicitly prohibits participation in such boycotts. Both the compelled speech and the prohibition on expressive conduct and association imposed by the Act constitute unconstitutional conditions on public contractors.

After the McCarthy era, the Supreme Court recognized that employment may not "be conditioned on an oath that one has not engaged, or will not engage,

[7] The State also argues that the EAA would be impossible to enforce if political boycotts were protected by the First Amendment, because companies would simply "mouth the words 'political boycott'" in order to avoid application of the statute. Opening Br. at 59. But one should not presume that companies will perjure themselves, and courts may adjudicate whether a company's boycott participation is sincerely motivated by its political convictions.

in protected speech activities" or "associational activities within constitutional protection." *Cole v. Richardson*, 405 U.S. 676, 680 (1972). The "modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674–75 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). In the public employment and contracting context, the unconstitutional conditions doctrine is governed by the framework established in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and its progeny. *See Umbehr*, 518 U.S. at 677 (holding that the *Pickering* framework also applies to government contractors); *accord Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1101 (9th Cir. 2011); *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923 (9th Cir. 2004).

When the government imposes a "'wholesale deterrent to a broad category of expression' rather than 'a post hoc analysis of one [contractor's] speech and its impact on that [contractor's] public responsibilities' . . . . the Court weighs the impact of the ban as a whole—both on the employees whose speech may be curtailed and on the public interested in what they might say—against the restricted speech's 'necessary impact on the actual operation' of the Government." *Moonin*, 868 F.3d at 861 (quoting *United States v. Nat'l Treasury Emps. Union*,

513 U.S. 454, 467 (1995) ("*NTEU*")). The government carries a heavier burden in this context because, "'[u]nlike an adverse action taken in response to actual speech,' a prospective restriction 'chills potential speech before it happens.'" *Id.* (quoting *NTEU*, 513 U.S at 468). The test applied in this context "more closely resembles exacting scrutiny than the traditional *Pickering* analysis." *Janus v. Am. Fed'n of St., Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018). Heightened scrutiny is especially appropriate where, as here, the government regulation is content and viewpoint based. *See Sanjour v. EPA*, 56 F.3d 85, 96–97 (D.C. Cir. 1995) (en banc).[8]

1. The Act Broadly Restricts Contractors' Expressive Conduct as Private Citizens Speaking on Matters of Public Concern.

The first prong of the *Pickering* analysis "involves two inquiries: whether the restriction reaches only speech within the scope of a [contractor's] official duties, and whether it impacts speech on matters of public concern." *Moonin*, 868 F.3d at 861. When evaluating a generally applicable prohibition like the one at issue here, courts "focus on the text of the [statute] to determine the extent to which it implicates [contractors'] speech as citizens speaking on matters of public

[8] According to the State, the Supreme Court held in *Janus* that *Pickering* was a poor fit in cases involving "mandates imposed as a condition of public employment." Opening Br. at 61. But *Janus* explained that the *Pickering* analysis was a poor fit because "it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree." 138 S. Ct. at 2473.

concern." *Id.* This Court has held that communication "with individuals or entities outside of [an employee's or contractor's] chain of command" is unlikely to constitute speech "pursuant to [official] duties." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074 (9th Cir. 2013) (en banc).

The district court had "little difficulty in finding that actions prohibited by the Act have no relation to Plaintiffs' official duties," and that "[t]he prohibited acts also have no relation to official contractors' duties in general." ER 30, 31. The Act, which applies to any company that has a contract to provide "services, supplies, information technology or construction" to a public entity in Arizona, requires contractors to certify that they will not participate in group boycotts of Israel. "The scope of 'official duties' that are encompassed by the number and diversity of companies contracting with the State vary dramatically and the plain language of the Certification Requirement does not limit its scope to prohibit actions taken in furtherance of those duties." ER 31.

Because the Act expressly prohibits participation in group boycotts of Israel, it "clearly aims to suppress expressive conduct that may be 'directed to community groups, to city and state legislators, to state and federal officials, and even to family members and friends,'" none of which are likely to be in a contractor's chain of command. ER 30 (quoting *Moonin*, 868 F.3d at 863). Here, for example, the State "cannot explain how preventing Plaintiffs from engaging in a boycott of

Israel as defined by the Act furthers or affects Plaintiffs' duty in representing his clients" under contract with Coconino County. *Id.*

The district court further held that the Act "unquestionably touches on matters of public concern." ER 31. "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane v. Franks*, 134 S Ct. 2369, 2380 (2014) (internal quotation marks omitted). "This circuit and other courts have defined public concern speech broadly to include almost *any* matter other than speech that relates to internal power struggles within the workplace." *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (emphasis in original). And the Supreme Court has made clear that an employee or contractor "need not address the public at large for his speech to be deemed to be on a matter of public concern." *Id.* (citing *Rankin v. McPherson*, 483 U.S. 378, 384–87 (1987)). Applying this broad standard, the boycott campaigns restricted by the Act undoubtedly constitute expression on matters of public concern. ER 32.

The State argues that the *Pickering* analysis does not apply because the Act regulates unexpressive conduct. Opening Br. at 61–62. As already discussed at length, the State is wrong. The State also argues that contractors are not speaking as "citizens" when they purchase items used in the performance of their job duties,

because the purchases themselves are effectively government speech. *Id.* at 62. This is nonsensical. The fact that a contractor might use a printer to perform their job duties does not mean that the selection of the printer itself is a job duty, much less government speech. To the contrary, contractors are generally "left free to do the assigned work and to choose the method for accomplishing it." *Independent Contractor*, Black's Law Dictionary (10th ed. 2014). But even putting that aside, the Act requires contractors to refrain from boycotting in all respects; it is not limited to the purchase of items used in the performance of a contractor's job duties.

2. The State's Asserted Interests Do Not Justify the Act.

"[W]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it . . . must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Moonin*, 868 F.3d at 865 (omissions in original) (quoting *NTEU*, 513 U.S. at 475). Further, there must be a "close and rational relationship" between the government's legitimate interests as an employer and its restrictions on speech. *Id.* at 867. In *NTEU*, for example, the Supreme Court struck down a ban on federal employees receiving honoraria for public speeches because, while "the government interest in preventing misuse of power by accepting compensation was 'undeniably powerful,' the government 'failed to show the

necessity of a total ban when it could not produce evidence of misconduct related to honoraria . . . .'" ER 34 (quoting *NTEU.*, 513 U.S. at 471–72). Applying this test, the district court rightly found that the State has failed to justify the Act. ER 32–34.

a. *The Act Is Not Tailored to the State's Asserted Interest in Preventing Discrimination.*

The State argues that the district court gave insufficient weight to its asserted interest in preventing discrimination based on nationality, national origin, and religion. Opening Br. at 41–47. It asserts that the court "appeared to discount the State's compelling anti-discrimination interests based on [the court's] citation to a single press release issued by the Arizona House Republican caucus." Opening Br. at 41. In fact, the court simply stated that "[t]he legislative history of the Act calls [the State's] stated interests into doubt," and cited the press release as an example. ER 33. The court nonetheless assumed "the legitimacy of the interests advanced by the State," and found "that neither of the proffered [anti-discrimination and economic regulation] interests justify the restriction because the Certification Requirement is not necessary to advance either of them." *Id.* With regard to the State's anti-discrimination interest, the court found that the State had produced no

evidence that Arizona has encountered widespread discrimination against Israel, Israeli entities, or entities that do business with Israel. ER 34.[9]

The State still has not provided any such evidence. Instead, it baldly asserts that "[t]o refuse to do business with individuals and entities on the basis of their nationality is to discriminate on the basis of nationality/national origin—*by definition*." Opening Br. at 44 (footnote omitted) (emphasis in original). But this is a tautology, not an argument. The State's definitional statement falls flat here, for three reasons.

First, the Act's scope far exceeds the State's definition of discrimination. The Act defines "boycott" to include refusals to deal with the Israeli government, as well as "persons or entities doing business in Israel or in territories controlled by Israel." A.R.S. § 35-393(1). Plaintiffs' boycott, for instance, focuses on companies supporting Israel's occupation of the Palestinian territories, including American companies that contract with the Israeli Defense Forces and operate in Israeli settlements in the West Bank. National origin discrimination, on the other hand, is discrimination based on "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*,

[9] In fact, the Act's primary sponsor could not even identify any companies participating in a boycott of Israel. When asked during a floor session whether he knew of any such companies, then-Speaker Gowan replied: "I know of none at the moment. . . . The point here is to be proactive and stand against that." H. Floor Sess. Part 3 – Comm. of the Whole #3, 2016 Leg., 2d Sess. (Ariz. 2016) at 17:20, *available at* https://tinyurl.com/y7nrw35x.

414 U.S. 86, 88 (1973). Plaintiffs' boycott does not target any individuals on the basis of their ancestry, citizenship, or religion. Nor does it target businesses on the basis of their association with individuals of a particular ancestry, citizenship, or religion. Instead, Plaintiffs' boycott—and others like it—are focused squarely on businesses that support Israel's occupation of the Palestinian territories. Nonetheless, these boycotts are prohibited under the Act.[10]

Second, the Act is not limited to "discriminatory" boycotts. The Act provides two alternative definitions for a "boycott" of Israel; only one includes actions taken "in a manner that discriminates on the basis of nationality, national origin or religion." A.R.S. § 35-393(1)(b). The State has conceded that this provision does not apply to Plaintiffs' boycott of companies supporting Israel's occupation of the Palestinian territories. ER 204. The other provision—the one that applies to Plaintiffs—prohibits boycott actions taken "in compliance with or adherence to calls for a boycott of Israel." A.R.S. § 35-393(1)(a). This provision would be redundant if it applied only to boycotts that discriminate based on nationality, national origin, or religion, so it must be doing something else. *See, e.g.*, *Chicanos*

[10] The State conflates discrimination based on nationality and discrimination based on national origin. Opening Br. at 44 n.2. This Court, however, has made clear that these terms are not synonymous. *See Ventress v. Japan Airlines*, 486 F.3d 1111, 1116 n.5 (9th Cir. 2007) ("For purposes of Title VII, citizenship and national origin are distinct concepts. Title VII prohibits only national origin discrimination, not discrimination on the basis of citizenship."). In any event, Plaintiffs' boycott is neither.

Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 868 (9th Cir. 2009) ("Arizona law, consistent with ordinary principles of statutory interpretation, requires that '[e]ach word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial.'" (alterations in original) (citation and some internal quotation marks omitted)), *aff'd sub nom. Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011).[11]

Third, if the Act were meant to further a non-discrimination interest, it is wildly underinclusive. As discussed above, most anti-discrimination statutes primarily regulate unexpressive conduct prohibit discrimination based on protected characteristics, such as race, sex, national origin, religion, and sexual orientation.[12] The Act, on the other hand, targets inherently expressive conduct (political

[11] The State has argued that A.R.S. § 35-393 (1)(b) covers actions that are motivated by discriminatory intent, while A.R.S. § 35-393(1)(a) covers actions that are discriminatory in effect. ER 151. But as discussed above, group boycott actions that target companies contracting with the Israeli government or operating in the occupied Palestinian territories are not discriminatory even in effect. Moreover, A.R.S. § 35-393(1)(b) applies to all actions taken "in a manner that discriminates," not just actions motivated by discriminatory animus.

[12] *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1725 (2018) (state law prohibited discrimination based on numerous protected characteristics in public accommodations); *N.Y. St. Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 4 (1988) (same); *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 541 n.2 (1987) (same); *Jaycees*, 468 U.S. at 615 (same); *Hishon*, 467 U.S. at 73 (Title VII prohibits discrimination based on numerous characteristics in employment); *Nat'l Ass'n of African-American-Owned Media v. Charter Comms., Inc.*, 908 F.3d 1190, 1202–04 (9th Cir. 2018) (42 U.S.C. § 1981 prohibits racial discrimination in contracting).

boycotts), and prohibits discrimination on the basis of nationality, national origin, or religion *only* when participating in a boycott of Israel or territories controlled by Israel. The Act does not prohibit such discrimination in any other context.

"Such '[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (quoting *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011)). And the existence of content-neutral alternatives—such as a statute prohibiting contractors from engaging in discrimination based on nationality, national origin, or religion generally—"undercut[s] significantly any defense of such a statute, casting considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (alteration in original) (citations and internal quotation marks omitted). Because a valid, generally applicable anti-discrimination statute would better serve the State's interests in preventing discrimination, the Act's content-based restrictions on boycotts of Israel are not "reasonably necessary" to achieve the State's anti-discrimination interests. *Id.* at 395–96. The only interest actually served by the Act "is that of displaying the [State's] special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids." *Id.* at 396.

The State attempts to avoid these glaring problems by insisting that the Court must defer to its determination that the Act's restriction on contractors' boycott participation is a necessary anti-discrimination measure. Opening Br. at 45. But "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Comms., Inc. v. Virginia*, 435 U.S. 829, 843–44 (1978).

Thus, the Supreme Court has "stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose [courts'] independent judgment of the facts bearing on an issue of constitutional law.'" *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)). In *NTEU*, for example, the Court acknowledged its "obligation to defer to considered congressional judgments about matters such as appearances of impropriety," but observed that "the Government cite[d] no evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16," and concluded that "on the record of [that] case [it] must attach greater weight to the powerful and realistic presumption that the federal work force consists of dedicated and honorable civil servants." 513 U.S. at 472, 476; *accord* ER at 34. The same principle applies here.

Even when the Court has deferred to legislative findings regarding the existence of a problem, it has reiterated that "[t]he remedies enacted by law . . . must comply with the First Amendment." *Citizens United*, 558 U.S. at 911. "[C]ategorical bans on speech that are asymmetrical to preventing" the legislatively defined problem cannot withstand judicial review. *Id.* Thus, even if the State could demonstrate that the Act is genuinely addressed to a compelling interest, it would also have to demonstrate that the remedy proposed here—forcing government contractors throughout Arizona to disavow participation in boycotts of Israel—is appropriately tailored to that problem.

The State has not made, and cannot make, this showing. The application of even a facially neutral anti-discrimination law to a protected form of expression and association, such as a political boycott, protest, or parade, violates the First Amendment. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657–59 (2000); *Hurley*, 515 U.S. at 568. Indeed, the *Claiborne* boycott itself explicitly targeted white-owned businesses, *Claiborne*, 458 U.S. at 900, and yet this did not undermine the boycott's constitutional protection. Under the State's logic, the government could have suppressed the boycott at issue in *Claiborne*, as well as the boycott campaigns targeting colonial Great Britain and apartheid South Africa, as racial or nationality discrimination. Such a result is flatly inconsistent with this country's constitutional tradition. "[B]y including politically motivated boycotts of Israel

within the activity that is prohibited, the Act is unconstitutionally over-inclusive." ER 34 (citing *Koontz*, 283 F. Supp. 3d at 1023).[13]

b. *The Act Is Not Tailored to the State's Asserted Interest in Regulating Commerce.*

The State maintains that it has properly acted to "align commerce in the State with the State's policy objectives and values," particularly its interest in supporting Israel and opposing BDS. Opening Br. at 48. *Claiborne*, however, established that the State's "broad power to regulate economic activity" does not confer "a comparable right to prohibit peaceful political activity such as that found in the [*Claiborne*] boycott." *Claiborne*, 458 U.S. at 913. The State's asserted interest in "align[ing]" contractors' boycott participation "with the State's policy objectives and values" is an impermissible content- and viewpoint-based justification for suppressing protected expression.

The State alternatively argues that the legislative findings "conclude that companies overly concerned with political matters are less reliable and efficient than those focused solely on conducting the business they contracted to perform." Opening Br. at 52–53. But it has not submitted any evidence to support this conclusion, nor has it explained why only companies boycotting Israel would

[13] The public accommodations laws at issue in *Dale* and *Hurley* were held unconstitutional as applied, rather than facially invalidated, because they primarily regulated unexpressive conduct. The Act, on the other hand, expressly targets political boycotts protected under the First Amendment.

present this problem, as opposed to companies focused on any other number of political issues. In fact, "[t]he Arizona Fact Sheet to House Bill 2617 plainly states that '[t]here is no anticipated fiscal impact to the state General Fund associated with this legislation." ER 33.

Because the State has not produced any evidence to show that the Act alleviates "real, not merely conjectural," harms "in a direct and material way," it has failed to failed to carry its burden of demonstrating that the Act has a "necessary impact on the actual operation of the State." *NTEU*, 513 U.S. at 468, 475.

c. *The State's Asserted "Anti-Subsidy" Interest Is Inapplicable.*

Finally, the State asserts that it has a compelling interest in denying "subsidies" to companies that boycott Israel. Opening Br. at 54. The district court concluded that "[t]he State's speculative fear[] of subsidizing boycotts of Israel, even assuming a legitimate one, does not justify the broad prospective restriction on boycotting activity that the Act prohibits." ER 34. The State disagrees, arguing that "the provision of public funds inevitably results in a subsidization of the activities of the fund recipient." Opening Br. at 53.

The State's argument proves too much. As discussed above, government contractors are treated like public employees for First Amendment purposes. *Clairmont*, 632 F.3d at 1101. If *any* government payment to an employee or

contractor necessarily subsidizes the recipient's private expressive activities, and the government has a compelling interest in denying such a subsidy, then there is no limit to the government's control over its employees' and contractors' free expression and association. The government could argue that an employee's paycheck subsidizes the gas used to travel to a protest, or that a contractor's fee subsidizes its private political activities. Such a result would upend decades of Supreme Court precedent. *See* ER 27.

The cases on which the State relies concern conditions on tax exemptions and federally-funded programs, not fee-for-service independent contractors. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983); *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017, 1024 (9th Cir. 1998). But even if the funding condition cases applied here, the State's argument would still fail. In *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, the Supreme Court held that "the relevant distinction that has emerged" in evaluating government funding conditions "is between conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the federal program itself." 570 U.S. 205, 214 (2013) ("*Open Soc'y I*"); *see also* ER 29 n.9 (collecting cases). As the district court found, the Act's boycott restriction is in no way limited to a contractor's work for the State. ER 31.

Rather, if a contractor does even $1 worth of business with a public entity, it must disavow participation in disfavored boycotts across the board.

Not to worry, the State argues, the contractor can carry on its boycott activities through an affiliate that does not contract with public entities. Opening Br. at 51–52, 56. This proposed solution is squarely prohibited by the Act, which defines a regulated "company" to include a contractor's "wholly owned subsidiary, majority-owned subsidiary, parent company *or affiliate*." A.R.S. § 35-393(2) (emphasis added). Attempting to read this provision out of the statute, the State has taken the position that "affiliate" does not include entities owned by the same individual as the public contractor. Opening Br. at 9; ER 155 n.8. This interpretation contradicts "[t]he plain and ordinary meaning of 'affiliate'" as "'a company effectively controlled by another or associated with others under common ownership or control.'" *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (quoting Webster's Third New International Dictionary 35 (2002)); *see also* A.R.S. § 10-140(5) (defining "affiliate," for purposes of Arizona corporations law, as "a person that directly or indirectly, through one or more intermediaries controls, is controlled by or is under common control with the person specified").

Even if the Act allowed affiliates to boycott, it would still violate the unconstitutional conditions doctrine. When the Supreme Court has "noted the

importance of affiliates in [the unconstitutional conditions] context, it has been because they allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program." *Open Soc'y I*, 570 U.S. at 219. Affiliates cannot serve that purpose when the funding condition requires the contractor to disavow boycott participation. "If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy." *Id*. (emphasis in original); *accord All. for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev.*, 911 F.3d 104, 110 (2d Cir. 2018) (*Open Soc'y II*). Moreover, even in the context of public grants, the Supreme Court has rejected the contention that the provision of public funds necessarily subsidizes a grantee's private activities outside the program. *Open Soc'y I* at 220.[14]

C. The State's Other Arguments Are Meritless.

The State's remaining arguments are easily dispatched. First, the State argues that "the district court erroneously treated the as-applied challenge brought

[14] In a last-ditch effort, the State attempts to analogize the Act to Executive Order No. 11,246 § 203 (1965), which prohibits federal contractors from engaging in employment discrimination based on national origin. Opening Br. at 54. The analogy is way off the mark. As discussed above, discrimination in employment is unexpressive conduct. *See Hishon*, 467 U.S. at 78. A funding condition that regulates unexpressive conduct does not pose the same First Amendment problems as a law targeting political boycotts protected under the First Amendment.

in this case as a facial challenge." Opening Br. at 57 (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009)). Unlike the plaintiffs in *Stormans*, however, Plaintiffs in this case clearly brought both facial and as-applied First Amendment claims, and asked for both facial and as-applied preliminary relief. ER 4, 275–77. Moreover, as the district court recognized, ER 29, the *NTEU* analysis is inherently facial because it requires the court to "consider all speech to which the challenged policy applies," not just the individual speech of the plaintiff. *Moonin*, 868 F.3d at 864; *see also Sanjour*, 56 F.3d at 92 & n.10 ("Because [the *NTEU*] test—which requires the court to go beyond the facts of the particular case before it—presumably applies to both 'facial' and 'as-applied' challenges, the distinction between the two is largely elided."). Applying that test, the district court concluded that the Act "violates the First Amendment on its face." ER 36.

Second, the State argues that "the district court's reasoning could upend federal sanctions law," because it would be impossible to distinguish between a First Amendment right to boycott and a corollary First Amendment "right to do business *with* countries like North Korea, Iran, Sudan, or Apartheid South Africa." Opening Br. at 59 . This is obviously wrong. Sanctions and embargoes prohibit *everyone* from doing business with the targeted country, which is necessary to "restrict[] the dollar flow to hostile nations." *Teague v. Reg'l Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968); SER 10. Because embargoes overwhelmingly

regulate non-expressive commercial transactions, "the infringement of first amendment freedoms is permissible as incidental to the proper, important, and substantial general purpose of the regulations." *Id.* at 446. The Act, on the other hand, intentionally penalizes political boycotts, a well-recognized form of political expression, based on their subject matter and viewpoint.

II. Plaintiffs Have Demonstrated Irreparable Harm.

The State also faults the district court's finding of irreparable harm. The court held that Plaintiffs "have met their burden" of establishing irreparable harm, because their "objections to the Act implicate core protections of the First Amendment." ER 35. The State asserts that the court improperly relied on the "abstract alleged deprivation of First Amendment rights," which the State belittles as "contrived." Opening Br. at 62–63.

The court's finding of irreparable harm was grounded in binding precedent. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court held that a rule requiring sheriff's office employees to choose between their jobs and adherence to the political party of their choice imposed irreparable harm, even though the employees could later receive back pay in the event their suit was successful. *Id.* at 373. The Court explained that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.*; *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (holding

that the harm "is particularly irreparable" when a law restricts political expression). This Court has held that "[a] 'colorable First Amendment claim' is 'irreparable injury sufficient to merit the grant of relief.'" *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)). And "[i]f the underlying constitutional question is close," this Court "should uphold the injunction and remand for trial on the merits." *Ashcroft v. ACLU*, 542 U.S. 656, 664–65 (2004).

Misunderstanding Plaintiffs' fundamental First Amendment injury, the State argues that it is speculative whether the Act would force Plaintiffs to violate their boycott by purchasing a Hewlett-Packard computer. Opening Br. at 61. But the Act does not require Plaintiffs to purchase a particular computer, it requires them to affirmatively disavow participation in a political boycott. As in *Elrod*, Plaintiffs' irreparable harm "stems . . . from the plainly unconstitutional choice the [Arizona] Law forces [them] to make: [they] either can contract with the state or [they] can support a boycott of Israel." *Koontz*, 283 F. Supp. 3d at 1026. That injury is not conjectural or speculative. Before the injunction was entered, Plaintiffs and government contractors throughout Arizona felt the pinch of monetary pressure to

sign the certification and refrain from any proscribed boycott activity. The Act thus continuously operated to chill Plaintiffs' and other contractors' speech rights. *Id.*[15]

III. The District Court Did Not Abuse Its Discretion by Temporarily Enjoining the State from Enforcing A.R.S. § 35-393.01.

Finally, the State challenges the district court's balancing of the equities, the scope of the injunction, and its refusal to sever the statute. None of these challenges has merit.

A. The Equities and the Public Interest Tip Sharply in Plaintiffs' Favor.

The "ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people subjected to the same restrictions." *Klein*, 584 F.3d at 1208 (citation and internal quotation marks omitted). Thus, once a plaintiff has demonstrated a likelihood of success on the merits of a First Amendment claim, "[t]he balance of equities and the public interest . . . tip sharply in favor of enjoining" the offending regulation. *Id.* (alterations and omission in original) (citation and internal quotation marks omitted). *Compare Stormans*, 586 F.3d at 1138 (holding that the balance of hardships and public interest do not necessarily

[15] The out-of-circuit cases on which the State relies are not to the contrary. They collectively acknowledge that an imminent threat to free expression interests justifies a finding of irreparable harm. *Google, Inc. v. Hood*, 822 F.3d 212, 227–28 (5th Cir. 2016); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006); *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999); *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989). The Act poses such a threat.

tip in favor of a plaintiff who has merely demonstrated a *colorable* First Amendment claim).

The State asserts that the district court failed to consider the irreparable harm that occurs "whenever an enactment of [a state's] people or their representatives is enjoined." Opening Br. at 64 (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)). To be sure, a state may suffer harm when its statutes are enjoined, but that "is not dispositive of the balance of harms analysis." *Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009), *vac'd and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of So. Cal., Inc.*, 565 U.S. 606 (2012). "Federal courts instead have the power to enjoin state actions, in part, because those actions sometimes offend *federal* law provisions, which, like state statutes, are themselves 'enactment[s] of its people or their representatives.'" *Id.* (emphasis in original) (quoting *Coal. for Econ. Equity*, 122 F.3d at 719). Here, the State's interest in enforcing a law that likely violates the First Amendment cannot overcome Plaintiffs' interest, and the public interest, in the exercise of First Amendment rights. *Doe*, 772 F.3d at 583; *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001).[16]

[16] The State argues that the district court should have deferred to the policy declarations of Congress and other state governments. Opening Br. at 65. But "[i]t is emphatically the province and duty of the judicial department to say what the law is," especially with respect to the Constitution. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

B. The Statewide Injunction Is Not Overbroad.

"A district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (citation and internal quotation marks omitted). In this case, after concluding that the Act "violates the First Amendment on its face," the district court entered a preliminary injunction that prohibits the State "from enforcing the Certification Requirement in A.R.S. § 35-393.01(A)." ER 36. The State argues that this injunction is overbroad.

First, the State contends that the injunction "violated this Court's general rule that 'in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs.'" Opening Br. at 68 (quoting *Takiguchi v. MRI Int'l, Inc.*, 611 F. App'x 919, 920 (9th Cir. 2015)). This is not the rule. A preliminary injunction may "reach beyond the particular circumstances of [the] plaintiffs" if they satisfy the standard for a facial challenge, as Plaintiffs have done here. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010).

Second, the State asserts that statewide relief is inappropriate because "Plaintiffs have at most established *one* [First Amendment] violation." Opening Br. at 68. But "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Because Plaintiffs have

established a facial First Amendment violation, facial injunctive relief is appropriate. *See, e.g.*, *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012) (concluding that Montana statute criminalizing political party endorsement of judicial candidates violated the First Amendment on its face, and entering a preliminary injunction against its enforcement). The cases on which the State relies did not address facial constitutional challenges to statutes. *See Horne v. Flores*, 557 U.S. 433, 470–71 (2009); *Lewis v. Casey*, 518 U.S. 343, 359 (1996).

Finally, the State insists that the preliminary injunction should have been "tailored to remedy the specific harm alleged," *Stormans*, 586 F.3d at 1119, and therefore limited to "boycotts that are (1) political in nature and (2) are not motivated by discriminatory animus." Opening Br. at 67. *Stormans* concluded that the preliminary injunction in that case was overbroad principally because the district court "erroneously treated the as-applied challenge brought in [that] case as a facial challenge." 586 F.3d at 1140. It further held that "the injunction, supposedly based on a free exercise challenge [to prescription filling regulations], is fatally overbroad because it is not limited to the only type of refusal that may be protected by the First Amendment—one based on religious belief." *Id.* at 1141.

Here, Plaintiffs challenged the Act both on its face and as applied to them, and the district court agreed that the Act is facially invalid. Moreover, the Act

violates the First Amendment because it compels government contractors to sign an unconstitutional certification disavowing participation in disfavored boycott campaigns. Even companies that do not currently participate in political boycotts of Israel cannot be required to sign such an unconstitutional form. *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 4–5 (1971). And the district court cannot rewrite the Act to compel the State to issue a different certification that exempts political boycotts, especially since it is undisputed that the Act itself is directed at political boycotts. *See NTEU*, 513 U.S. at 479 ("We cannot be sure that our attempt to redraft the statute to limit its coverage to cases involving an undesirable nexus . . . would correctly identify the nexus Congress would have adopted in a more limited honoraria ban."). The district court "properly left to [the legislature] the task of drafting a narrower statute." *Id.*

C. Severance Is Not Warranted.

Finally, the State argues that the district court erred by refusing to conduct any severability analysis. Opening Br. at 69. In fact, the court did sever the statute by enjoining only A.R.S. § 35-393.01(A), while leaving A.R.S. § 35-393.01(B) (prohibiting public entities from adopting investment, procurement, or other policies that have "the effect of inducing or requiring a person or company to boycott Israel") and A.R.S. § 35-393.02 (requiring public funds to divest from

companies that boycott Israel) fully intact. The State nonetheless maintains that the court should have further severed the Act.

First, the State argues that "the district court failed to analyze whether allowing contractors to set up separate business entities to perform governmental contracts would address the constitutional problems it identified." Opening Br. at 69–70. As discussed above, the use of affiliates cannot save the Act. *See Open Soc'y*, 570 U.S. at 219.

Second, the State argues that the court should have severed A.R.S. § 35-393(1)(a), which prohibits participation in boycotts of Israel or territories controlled by Israel in response to a boycott call, and left intact A.R.S. § 35-393(1)(b), which prohibits boycotts against Israel or territories controlled by Israel that "discriminate[] on the basis of nationality, national origin, or religion." Opening Br. at 70. As the district court explained, however, even a "discriminatory" boycott of all Israel is entitled to constitutional protection if it "is taken in response to a larger call for such action." ER 17. By the same token, many political boycott campaigns that could be characterized as discriminatory—such as the *Claiborne* boycott against white-owned businesses, the colonial boycott against Great Britain, or the boycott campaigns against apartheid South Africa—have long been understood to enjoy First Amendment protection. The State cannot constitutionally prohibit such boycotts by characterizing them as discrimination,

especially pursuant to a content- and viewpoint-based law that applies only to disfavored boycotts. If the State wishes to prevent discrimination based on nationality, national origin, or religion in employment, access to public accommodations, and other areas of unexpressive conduct, it remains free to do so.

Finally, the State argues that the court "fail[ed] to save the Act insofar as it applies to commercial—i.e., non-political—boycotts." Opening Br. at 70. Of course, the Act could constitutionally restrict boycotts motivated by economic self-interest. But doing so would have required the court to rewrite the Act, not sever it. There is nothing in the Act that could be severed or construed to limit its application to such boycotts. And the Act's legislative findings indicate that it is directed at politically motivated BDS boycotts, as the State has long acknowledged in defending it. *See* ADD-12; ER 15–16, 32. The court cannot rewrite the Act in a way that would directly contravene the legislature's intent. *State Comp. Fund v. Symington*, 848 P.2d 273, 280 (Ariz. 1993) (en banc) (Ariz. 1990).[17]

[17] The latter two arguments are also subject to forfeiture, at least for purposes of this preliminary injunction appeal, because the State failed to raise them before the district court. *See Bishop v. Smith*, 760 F.3d 1070, 1094–96 (10th Cir. 2014).

CONCLUSION

For the foregoing reasons, the district court's order granting Plaintiffs' motion for preliminary injunction should be affirmed.

Respectfully submitted,

/s/ Brian Hauss
Brian Hauss
Vera Eidelman
Ben Wizner
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2500

Kathleen E. Brody
ACLU Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
T: (602) 650-1854

Attorneys for Plaintiffs-Appellees

Dated: January 17, 201

STATEMENT OF RELATED CASES

Plaintiff-Appellees are not aware of any related cases pending in this Court that are related to this appeal, as defined and required by Circuit Rule 28-2.6.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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